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No. 82-1174

IN THE

Supreme Court of the United States

October Term 1982

INTERSTATE MARINA DEVELOPMENT CO., a limited partnership,

Petitioner,

vs.

DORILL B. WRIGHT, *et al.*,

Respondents.

REPLY BRIEF (IN SUPPORT OF PETITION FOR CERTIORARI).

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Introduction.

The Court below held that the devastation visited on Petitioner was not a taking because it was temporary (Petition for Certiorari, Appendix A, pp. 4-5); thereby it begged the issue of a *temporary* taking and created express conflict with *Gordon v. City of Warren*, 579 F.2d 386 (6th Cir. 1978).

Instead of confronting the conflict issue, Respondents seek to evade it by mischaracterizing Petitioner's position below, and by embracing arguments that simply defy hornbook federal law.

ARGUMENT.

1.

Respondent's Imputation to Petitioner of a "Concession" That Its Claim Under 42 U.S.C. §1983 Is Barred, Is Untrue and Seeks to Evade This Court's Directly On-Point Holding in *Lake County Estates*.

One is startled to read (at pp. 1-2 and 14 of the Brief in Opposition; hereafter Br. Opp.) that Petitioner "admitted" and "conceded" that 42 U.S.C. §1983 relief is barred. Petitioner's brief below speaks for itself:

> ". . . IMDC is asserting a claim directly under the Fifth and Fourteenth Amendments under the doctrine laid down in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 .... (1971), *in addition to the Civil Right Act (42 U.S.C. §1983 — see e.g. Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, supra*, in which the taking claim was premised on the Civil Rights Act.)"
>
> Appellant's Opening Brief, p. 16, emphasis added.[1]

No such admission or concession has been made. On the contrary, Petitioner has always sought, and is still seeking, relief under 42 U.S.C. §1983.

Besides, this Court made it clear in *Lake Country Estates, supra*, 440 U.S. 391, that 42 U.S.C. §1983 does indeed provide a proper basis for seeking relief against non-legislative state officials (the Eleventh Amendment notwithstanding), specifically in the taking-by-regulation context. The fact that a defendant is a state official does not afford him immunity from liability under §1983 for his

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[1]Page 25 [et seq.] of Appellant's Opening Brief below, alluded to — but not quoted — at Br. Opp. 2, addressed the *Bivens* theory of direct constutional liability. By no stretch of the imagination did it comprise a waiver of the §1983 theory which — as shown *supra* — was asserted by Petitioner in addition thereto.

unconstitutional acts; see *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

Finally, it seems quite apparent that what Respondents are about by bringing up this red herring is to divert the Court's attention from the settled rule that even under Respondent's view of the Eleventh Amendment (which is not in issue here),[2] individual officials can be liable. Hence, the individual respondents have evidently conjured up here a fanciful "concession" which could conveniently let them evade accountability to the Constitution. Here, unlike in *Ford Motor* relied on by Respondents, Petitioner seeks relief not only against the Commission but also against the individual Respondents who now recognize as they must that their actions were — and were adjudged to be — unlawful (Br. Opp. 11). In short, even giving Respondents' argument a favorable reading, it is hornbook law that *an individual* acting under color of state law is responsible for his *individual* misdeeds. The fact that he may be a [non-legislative] state official does not grant him immunity, but, on the contrary, establishes that the wrongful act constitutes state action. As this Court aptly and explicitly explained in *Screws v. United States*, 325 U.S. 91, 107-108 (1945), the fact that one's actions are *unlawful* under state law does not

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[2]Since, however, Respondents persist in arguing this non-issue (Br. Opp. 14-15) suffice it to note that in *Ford Motor Co. v. Dept. of Treasury*, 323 U.S. 459, 465-466 (1945) on which Respondents rely, the statute in question authorized suits against the State in ". . . circuit or superior court of the county in which the taxpayer resides or is located . . ." (Id. at 465). At bench, the pertinent statute (Cal. Public Resources Code §30334; quoted at Br. Opp. 14) expressly provides that the Commission may be sued ". . . in any litigation or proceedings *before any court . . . of the . . . federal government . . .*," emphasis added. How much more explicit can legislative leave to sue in federal courts be?

Moreover, *Ford Motor* itself was explicit that individual officials *are* liable for their acts (323 U.S. at 462), and are not shielded by the Eleventh Amendment.

create immunity to federal law. "The defense is not pretty. Nor is it valid" *Ibid.* at 114, Rutledge J. concurring.

2.

Respondents' Argument That Since Their Conduct Was Unlawful Under State Law, That Makes Them Immune to Federal Laws, Defies a Century of Federal Law.

Respondents' reply to the fact that their conduct was adjudged unlawful by state courts, is both a quibble and an absurdity.

Their quibble is that the judgment against them was not "final" (Br. Opp. 11), and the absurdity is that the federal courts cannot afford relief because Respondents' conduct was not found unconstitutional by the state courts (*Id.*).[3] Neither branch of this argument has any merit.

The quibble, far from aiding Respondents, is precisely the sort of harrassment accomplished by shifting the wrongdoer's position, that was rightly denounced by Mr. Justice Brennan in *San Diego Gas & Electric*, 450 U.S. 621, 655-656, fn. 22 (1981).[4] As Appendix A to Br. Opp. (at p. 5) makes clear, the state court determined that Respondents had ". . . no reasonable, rational or cogent reason . . ." for crippling Petitioner's project with unreasonable bonding conditions, and that Respondent Commission was ". . . acting arbitrarily, capriciously and in excess of jurisdiction conferred upon it by law or regulation" (*Id.* at p. 6). When (instead of obtaining an appellate adjudication thereof)

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[3]It is on that latter basis that Respondents ingeniously seek to distinguish *Gordon v. City of Warren*, 579 F.2d 386 (6th Cir. 1978).

[4]Please note that since the instant Petition was prepared, the Seventh Circuit has again explicitly taken the position that on the issue of taking and remedies, Mr. Justice Brennan's opinion in *San Diego* reflects the view of this Court's majority. See *Barbian v. Panagis*, 694 F.2d 476, 482, fn. 5 (7th Cir. 1982).

Respondents acceded to the state trial court's judgment and rescinded the unlawful conditions, they did not thereby vindicate their actions; quite the contrary: they merely obeyed a court decision *against them*. Besides, one would think it basic that Respondents' arbitrariness, capriciousness, lack of jurisdiction and lack of any reasonable, rational or cogent reason for their actions, are the very essence of denial of due process!

The absurdity inherent in Respondents' argument lies in the fact that it would make federal liability (under 42 U.S.C. §1983 *inter alia*) dependent on a prior *state* court determination of unconstitutionality, before the federal judicial power could be invoked. The fact that state law may provide a non-constitutional remedy in no way precludes a plaintiff from suing under §1983; that very argument was made in *Monroe v. Pape*, 365 U.S. 167, 172 (1961), only to be squarely rejected: "It is no answer that the State has a law which if enforced would give relief. *The federal remedy is supplementary to the state remedy*, . . ." (*Id.* at 183, emphasis added).

And so it is here. The fact that the state court afforded non-monetary relief on the basis of state law (the only relief it could grant) in no way affected Petitioner's *federal* right under *Gordon v. City of Warren* to an action at law under §1983. Also see *Sixth Camden Corp. v. Township of Evesham*, 420 F.Supp. 707 (D.N.J. 1976). With all due respect, to suppose that the United States Court of Appeals in *Gordon* could not have acted to grant relief were it not for the Michigan Supreme Court first issuing it a license to do so, as it were, by making an antecedent finding of unconstitutionality, is simply absurd; it stands the very concept of federal supremacy on its head.

3.

Respondent's "Explanation" That There Is Nothing "Extraordinary" About Unlawfully Denying a Land Owner All Use of Land for Over a Half-Dozen Years, Merely Bespeaks the Appalling Conditions in California and the Urgent Need for Intervention by This Court.

There is little that can be added to the above heading. World War II lasted only 3½ years; yet this Court repeatedly ruled in both direct and inverse condemnation cases that just compensation had to be paid for the duration of temporary takings. See *e.g.*, *United States v. Causby*, 328 U.S. 256 (1946), *United States v. General Motors Corp.*, 323 U.S. 373 (1945). Indeed, as *General Motors* and *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1948) show, the measure of damages in a temporary taking may be greater, because the harm may be greater.

And yet in the case at bench, Respondents blandly assert that there is nothing "extraordinary" in *de facto* deprivation of *all* use and benefit of private property for a period *twice as long as World War II*. Indeed, in *San Diego Gas & Electric Co.*, Mr. Justice Brennan stressed the remedial need where — coincidentally — a seven-year regulatory taking had occurred. (450 U.S. at 655, fn. 22).

In short, the fact that a seven-year deprivation of all use of property, and a *pro tanto* full and irretrievable confiscation of a significant portion of Petitioner's leasehold can be blandly characterized by Respondents as not at all "extraordinary", makes clear, perhaps better than Petitioner can, just how far things have deteriorated in California.

If a seven-year taking is the "ordinary" norm, then just how egregious must things get to invoke judicial relief?

Conclusion.

Petitioner has been totally deprived of its property for seven years, and — to add insult to injury — was made to pay rent and taxes to the government which deprived it of all benefit of the subject property. Because Petitioner is a lessee those years have been irretrievably confiscated. There has been a temporary taking here, which — as Mr. Justice Brennan put it — is no less a taking merely because it is temporary (450 U.S. at 657). Relief by this Court is both warranted and urgently needed in light of the disarray in the law briefed by Petitioner and not disputed by Respondents.

Petitioner prays that the writ of certiorari issue.

Respectfully submitted,

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